

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA 08-1305

JIMMY SLAVENS

APPELLANT

V.

CONFORM, INC., COMPANION
PROPERTY & CASUALTY GROUP, and
SECOND INJURY FUND

APPELLEES

Opinion Delivered APRIL 8, 2009

APPEAL FROM THE WORKERS'
COMPENSATION COMMISSION
[NO. F501760]

AFFIRMED

JOHN B. ROBBINS, Judge

In this workers' compensation case, appellant Jimmy Slavens suffered a compensable right-shoulder injury in November 2004, resulting in maximum medical improvement in February 2006 and a six-percent anatomical impairment. The employer, Conform, Inc., accepted and paid that rating. The Second Injury Fund (appellee herein) accepted and paid a fifteen-percent wage-loss disability rating flowing from that injury. Appellant sought permanent total disability (PTD) or alternatively a greater percentage of wage loss, which appellee resisted. After a hearing before an administrative law judge (ALJ), it was found that appellant had failed to prove by a preponderance of the evidence that he qualified for PTD. Appellant appealed that decision to the Workers' Compensation Commission, which affirmed and adopted the ALJ decision in a two-to-one vote. This appeal followed. After conducting our appellate review under the proper standards, we affirm.

The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case de novo. *Williams v. Prostaff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). The determination of the credibility and weight to be given a witness's testimony is within the sole province of the Commission. *Arkansas Dep't of Health v. Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *See id.* The Commission, as fact finder, must resolve any conflicts in evidence. *Warwick Elec., Inc. v. Devazier*, 253 Ark. 1100, 490 S.W.2d 792 (1973). *See also Holloway v. Ray White Lumber Co.*, 337 Ark. 524, 990 S.W.2d 526 (1999); *Green Bay Packaging v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 695 (1999).

The wage-loss factor is the extent to which a work injury has affected the employee's earning capacity. *See Rutherford v. Mid-Delta Cmty. Serv., Inc.*, 102 Ark. App. 317, ___ S.W.3d ___ (2008). *See also Rooney & Travelers Insurance Co. v. Charles*, 262 Ark. 695, 560 S.W.2d 797 (1978); *Sapp v. Phelps Trucking, Inc.*, 64 Ark. App. 221, 225, 984 S.W.2d 817, 819 (1998). Attendant factors relevant to that query include medical evidence, age, education, experience and other circumstances reasonably related to a claimant's earning power. *Perry v. Mar-Bax Shirt Co.*, 16 Ark. App. 133, 698 S.W.2d 302 (1985). *See also Johnson v. Latex Constr. Co.*, 94 Ark. App. 431, 232 S.W.3d 504 (2006). The claimant's motivation to return to work, or lack thereof, is a factor that can be considered when determining an employee's future earning

capacity. *Id.* The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Oller v. Champion Parts Rebuilders, Inc.*, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

Here, appellant contended that his earning capacity was significantly affected beyond his anatomical impairment rating and partial wage-loss that had been accepted and paid. The claim was heard on July 11, 2007. The evidence showed that appellant was in his fifties and had earned a GED certificate. His work experience was primarily in construction, and he had suffered prior injuries.

In 1981, appellant hurt his low back, which resulted in surgery and a fifteen-percent permanent impairment rating. Appellant also had surgery on both knees and surgery to repair a torn rotator cuff in his left shoulder. He underwent a second back surgery in 1989, resulting in a ten-percent impairment rating. Appellant received social security disability benefits for these prior conditions.

Appellant had attempted to start his own concrete business in early 2004, which lasted for about five months. Appellant ended that business due to his inability to find good workers. Shortly thereafter, in August 2004, appellant was hired on by Conform, Inc. He was drawing social security disability benefits when he commenced working for Conform, Inc. as a general superintendent, ensuring that five concrete-work crews had the necessary materials and equipment. His position was essentially as a supervisor without physical labor requirements.

On November 15, 2004, appellant was on one work site and attempted to assist a construction worker to move a generator, but the worker dropped his end of the generator, which caused a rotator-cuff tear in appellant's right shoulder. He underwent repair surgery in February 2005 performed by orthopedic surgeon Christopher Arnold. Dr. Arnold released appellant from care in February 2006 with a six-percent impairment rating to the body as a whole for the right-shoulder surgery. Dr. Arnold opined that appellant no longer suffered from any symptoms, had full range of motion and good strength in that extremity, and that appellant should resume his normal work with the suggestion to avoid repetitive overhead activity.

Appellant did not believe he could return to work after he healed from his most recent job injury because he believed he needed to sit or lay down as needed for pain. Appellant stated that he could not have returned to Conform when he was released by Dr. Arnold because Conform had been sold. Appellant did not request any rehabilitation plan nor did he seek other employment, although he had at one time held a real estate license. Appellant lived on his disability benefits. Appellant said that his back and his right shoulder continued to hurt, which limited him because he was right-hand dominant. No medical evidence supported the contention that he was unable to work in any capacity.

The ALJ specifically noted that while appellant testified that he could not work, there was no evidence in the record other than his own opinion that he was unable to work. The ALJ noted that appellant was drawing social security disability when he began work for Conform, Inc., but that this showed he was able to function in a supervisory capacity despite

prior injuries. In short, the ALJ deemed appellant's testimony that he was unable to work due to his combined physical limitations to be not well founded. While one Commissioner dissented from the majority opinion, and appellant contends that the dissenter's reasoning should prevail, we disagree.

The wage-loss question is a fact-intensive inquiry. Appellant abandoned his claim to some amount of wage-loss less than permanent total disability. This was a significant burden upon appellant to prove he was unable to earn meaningful wages in this or any other employment. Ark. Code Ann. § 11-9-519(e)(2). There is a substantial basis for the Commission and ALJ to find that he failed to persuade.

We affirm the denial of permanent total disability benefits.

Affirmed.

KINARD and BAKER, JJ., agree.